Supreme Court, U.S.
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No. 01-1726

In The

Supreme Court of the United States

MIGNON MOORE,

Petitioner,

v.

TRAVIS PRUITT & ASSOCIATES, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The parties to this proceeding are set forth in the case caption.

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STATEMENT OF THE CASE

The following facts were misstated or omitted by Petitioner Mignon Moore ("Moore") in her statement of facts:

This case involves a claim that Moore's co-worker, Michael Taylor, sexually harassed her. Taylor was not a supervisor, much less Moore's supervisor; in fact, Moore and Taylor did not work on the same projects, did not work with the same people, and had no work-related reason to communicate with each other.

On March 5, 1998, Moore complained to Travis Pruitt, Sr., President of Respondent Travis Pruitt & Associates, P.C. ("TPA"), that Taylor was harassing her. In response to that complaint, Pruitt told Moore that she and Taylor were not to have any further communications with each other except through their supervisor. Pruitt also told Moore to inform him or Pete Smith, another member of TPA management, if she had any problems with Taylor or any other employee. On March 9, 1998, Pruitt issued separate letters to Taylor and Moore, informing them that each person was to have no further contact with the other.

Moore testified that she subsequently communicated with Taylor when, in response to his attempts to communicate with her on August 19 or 20, 1998, she threw her arms up in the air and told Taylor, "Leave me alone." Pruitt terminated Taylor's employment as a result of his violation of the communication ban.

Moore told Pruitt during his last meeting with her that "she had gone to a place where she was in clear view of Mike Taylor and she had gestured at him and had issued some statement to him. And that was not what she

was supposed to do." Therefore, Pruitt also terminated Moore's employment for violation of the communication ban.

The district court properly found that Moore was not complaining about *sexual* harassment in August of 1998; rather, she was complaining to Taylor directly, and to Pruitt, that Taylor was violating the communication ban. There is no evidence in the record that any allegedly *sexual* harassment occurred after Pruitt instituted the communication ban, notwithstanding Moore's recitation of fact that "Michael Taylor began what would become a two year campaign of sexual harassment of Moore . . . [and TPA] failed to take effective action to end the harassment [prior to terminating Taylor and Moore]."[1]

Finally, Moore claims that "the provision for jury trials was the most contentious part of the 1991 Civil Rights Act," 42 U.S.C. §1981a, and "[i]t was the proposed authorization of jury trials in sex discrimination cases, that particularly divided members of Congress."[2] However, the legislative history of the Civil Rights Act of 1991 is limited, because most of the discussion that led to the compromise statute took place in closed door discussions between the White House and Congressional leaders. *See Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1278 (11th Cir. 1999) (Barkett, J. dissenting), *citing* Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625, 652 n.147 (1996). The

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[1] Moore's Petition for Writ of Certiorari ("Moore Cert. Pet."), p. 2.

[2] Moore Cert. Pet., p. 7.

House Judiciary Committee devoted only two paragraphs of its Judicial Committee Report to the 102nd Congress on May 17, 1991, to discussing the jury reform provision in the Act. H.R. REP. No. 102-40, pt. 2. The divisive issue concerning the Civil Rights Act of 1991 was the addition of compensatory and punitive damages, not jury trials.

REASONS FOR DENYING THE WRIT

I. Moore Failed To Establish That The Decision Of The Eleventh Circuit On Her Hostile Work Environment Claim Conflicts With The Decision Of A United States Court Of Appeals.

The Court should deny the Petition for Writ of Certiorari because no conflict exists among the circuits. Moore argues that the decision of the Court of Appeals for the Eleventh Circuit in this case[3] is in conflict with decisions of the First, Second, Third, and Seventh Circuits. This contention is merely an attempt to manufacture a conflict where none exists, because neither the Eleventh Circuit nor the other circuits cited as being in accord have adopted the holding that Moore attributes to them.

[3] Moore also contends that the Fourth, Sixth, Eighth, and Ninth Circuits apply the same rule of law allegedly followed by the Eleventh Circuit in this case by "rejecting" the reasonable juror standard in determining the existence of an objectively hostile work environment on summary judgment. Moore Cert. Pet., pp. 10-12.

A. The Courts In This Case Did Not Reach The Holding Moore Attributes To Them.

Moore alleges that in granting summary judgment to TPA in the instant case, the district judge[4] ruled that the alleged harassment was not sufficiently severe or pervasive to create an objectively hostile environment by resolving the claim on the merits himself, rather than determining whether a reasonable juror could find that the alleged harassment was objectively hostile. She bases this argument on the district court's statement that "the court finds that Taylor's conduct did not create an objectively hostile work environment."[5] Moore further alleges that the Eleventh Circuit in its *de novo* review similarly made its own determination of whether the alleged harassment was objectively hostile, rather than determining whether a reasonable juror could reach that conclusion, based on the following statement: "The district court properly determined that Taylor's conduct did not create an objectively hostile work environment."[6]

Neither the district court in this case nor the Eleventh Circuit substituted their independent judgment of whether the alleged harassment created an objectively hostile environment for a determination of whether a reasonable juror could find an objectively hostile environment. The district court stated at the outset that its determination on summary judgment is limited to the following:

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[4] The district judge adopted the Magistrate Judge's Report and Recommendation.

[5] Moore Cert. Pet., App. 22a.

[6] Moore Cert. Pet., App. 8a.

> Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." [*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)].[7]

The district court found that Moore failed to create a genuine issue of fact as to whether the conduct was objectively or subjectively hostile or abusive, and summarized its holding as follows:

> Because a reasonable jury could not find that the harassment complained of affected a term, condition or privilege of Plaintiff's employment, [the court grants summary judgment to TPA] on Plaintiff's hostile work environment claim.[8]

The Eleventh Circuit reached the same conclusion, holding that "[t]he district court properly determined that Moore had failed to establish an adequate basis to support a finding that Taylor's acts were sufficiently severe to alter the terms or conditions of her employment so as to create an objectively hostile work environment."[9]

Thus, Moore is essentially complaining that the underlying decisions in this case were poorly drafted, because the district court and Eleventh Circuit did not explicitly reiterate the "fair-minded jury" summary judgment standard before each of its "findings" so as to state the obvious: the court on summary judgment determines whether a reasonable jury could find for the non-movant

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[7] Moore Cert. Pet. App. 18a.

[8] Moore Cert. Pet. App. 22a-24a.

[9] Moore Cert. Pet. App. 9a.

on the evidence presented, with all inferences resolved in favor of the non-movant. The district court stated this well-established standard at the outset, and repeated it in concluding that a reasonable juror could not find that the harassment complained of supported a hostile work environment claim. The Eleventh Circuit agreed with this result. Therefore, contrary to Moore's representation, the courts in this case did not reject a reasonable juror standard on summary judgment in favor of substituting their own independent judgment on the merits. This case simply does not present the issue Moore attributes to it in her Petition for Writ of Certiorari.

B. The Fourth, Sixth, Eighth, Ninth And Eleventh Circuits Have Not Rejected The Reasonable Juror Standard In Determining The Sufficiency Of A Hostile Work Environment Claim On Motions For Judgment As A Matter Of Law.

The opinions of the Fourth, Sixth, Eighth, and Ninth Circuits cited by Moore contain statements regarding the court's "findings" without further clarification of the basis for reaching each such finding. Moore misconstrues this omission to represent a radical departure from the reasonable juror standard on a motion for summary judgment regarding a hostile work environment harassment claim. As is evident from other decisions by these circuits resolving summary judgment motions on hostile work environment harassment claims, these circuits do not resolve such claims in the manner she contends. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) ("We are therefore satisfied that a reasonable jury examining the totality of the circumstances could find . . . that a

hostile work environment confronted Spriggs during his first term of employment with Diamond."); *Williams v. General Motors Corp.*, 187 F.3d 553, 563 (6th Cir. 1999) ("[W]e believe a rational trier of fact could conclude that Williams was subjected to a hostile work environment."),[10] *Beard v. Flying J, Inc.*, 266 F.3d 792, 797-98 (8th Cir. 2001) ("To establish a submissible case of sex discrimination, Ms. Beard was required to produce evidence that would allow a reasonable jury to conclude that she was a member of a protected group, that she was subjected to unwelcome sexual harassment, that the harassment was based on sex, and that the harassment affected a term, condition, or privilege of her employment.");[11] *Burks v. California Highway Patrol*, 2 Fed. Appx. 887, Nos. 99-56394, 99-56905, 2001 WL 80409, *1 (9th Cir. 2001) ("No rational jury could find a hostile work environment on the basis of the evidence Burks presented.").[12]

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[10] *See also Abeita v. Transamerica Mailings, Inc.*, 159 F.3d 246, 248 (6th Cir. 1998) ("We reverse the grant of summary judgment on plaintiff's hostile work environment claim because the facts viewed in the light most favorable to the plaintiff would permit a jury to find objectively severe and pervasive harassment.").

[11] *See also Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999) ("Carter produced enough to avoid summary judgment because on such a record a factfinder could find the harassment sufficiently severe or pervasive to create liability under Title VII."); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1159 (8th Cir. 1999) ("This type of [harassing] conduct could be found by a jury to be sufficiently offensive to have altered Ms. Breeding's working conditions.").

[12] In order to resolve any lingering doubts, although not mentioned by Moore, the Tenth and District of Columbia Circuits similarly apply the reasonable juror standard on a motion for summary judgment involving hostile environment harassment claims. *See O'Shea v. Yellow Technology Servs., Inc.*, 185 F.3d 1093, 1096 (10th Cir. 1999) ("Thus, the

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Moreover, the en banc majority of the Eleventh Circuit in *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999), recited the reasonable juror standard at the outset before proceeding to "find" that plaintiff could not survive a motion for judgment as a matter of law on the objectively hostile environment prong of her sexual harassment claim:

> If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted. [Cit. omitted]
>
> * * *
>
> Thus, to affirm the judgment as a matter of law, we must be convinced that no reasonable juror could have concluded that the conduct complained of constituted actionable sexual harassment in violation of Title VII.

195 F.3d at 1244, 1259.[13]

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critical issue is whether, examining all of the evidence and reasonable inferences therefrom in a light most favorable to Plaintiff, a jury reasonably could infer that a hostile work environment existed . . . "); *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (holding that a jury may resolve the point at which a supervisor's harassment became severe or pervasive, "but without improperly resolving disputed issues of fact, we cannot.").

[13] *See also Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002) ("[W]e conclude that fair-minded jurors could have reasonably concluded that Miller suffered severe and pervasive harassment sufficient to alter the terms or conditions of his employment."); *U.S. Equal Employment Opportunity Comm. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1249 (11th Cir. 1997) ("Some remarks, moreover, were so patently offensive that a jury could have inferred from their very nature both that Paigo was offended by them

(Continued on following page)

Finally, it is telling that none of the Fourth, Sixth, Eighth, Ninth, and Eleventh Circuit authorities that Moore cites in support of her argument even address any circuit split as to a reasonable juror standard on this issue, much less articulate a rejection of that standard or an affirmative adoption of a rule allowing the court to substitute its own judgment for its judgment of what a reasonable juror could find. No such divergence of authority exists. This issue is not appropriate for review by this Court.

II. The Ruling Below On Moore's Hostile Work Environment Claim Does Not Conflict With Existing Supreme Court Precedents.

Moore does not contend that the rulings below conflict with existing Supreme Court precedents. In fact, the rulings below are consistent with this Court's statements in *Faragher* that judgment as a matter of law should be granted in favor of employers to filter out claims lacking objective evidence of extreme and pervasive discriminatory conduct. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

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and that those making them would have realized they were unwelcome.").

III. This Case Does Not Present A Split Of Circuit Authority As To Whether Rejection Of A Harasser's Advances Constitutes Protected Opposition Under Section 704(a) Of Title VII.

As with Moore's first issue presented to this Court, the courts below did not render the decision attributed to them by Moore, and this case does not involve a split of circuit authority on Moore's second issue on petition for a writ of certiorari.

A. The Eleventh Circuit Held That Moore Established A *Prima Facie* Case Of Protected Activity Under The Opposition Clause.

According to Moore, the Eleventh Circuit ruled that her request to Taylor, a co-worker but not her supervisor, that he "leave [her] alone" pursuant to the communication ban was not protected by the opposition clause of Title VII's anti-retaliation provision.[14] 42 U.S.C. §2000e-3(a). To the contrary, the Eleventh Circuit in this case "assume[d], as the district court did, that Moore established a *prima facie* case of retaliation," before determining whether TPA articulated a legitimate, nondiscriminatory reason for terminating her employment for violating the communication ban.[15] The first prong of a *prima facie* case of retaliation under Eleventh Circuit jurisprudence requires a showing that plaintiff engaged in statutorily protected expression. *See Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d

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[14] Moore Cert. Pet., p. 18.

[15] Moore Cert. Pet. App. 6a.

1453, 1454 (11th Cir. 1998). Thus, the Eleventh Circuit ruled that Moore established a *prima facie* case of statutorily protected expression under the opposition clause. The reasonable inference to be drawn from the Eleventh Circuit's opinion is that it then reached the same conclusion as the district court in finding that Moore's gesture and statement to Taylor, a non-supervisor, regarding his violation of the communication ban was not a report of an unlawful employment practice.[16]

Again, the district court found that, although Moore was complaining that Taylor was harassing her in August, 1998, she was not complaining that he was harassing her on the basis of *sex* in August, 1998.[17] There is no record evidence of sexual harassment, or of Moore's complaint of *sexual* harassment to TPA or Taylor, after Pruitt issued the communication ban.

B. There Is No Split Of Circuit Authority As To Whether A Statement To The Non-Supervisor Harasser Allegedly Rejecting His Advances Is Protected Opposition Under Section 704(a).

This case does not present the split of authority that Moore alleges; the statement of rejection to a non-supervisor in this case is distinguishable from the cases cited by Moore involving complaints of actionable harassment to supervisors or rejection of a supervisor's orders. Even if the Eleventh Circuit had reached the holding

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[16] Moore Cert. Pet. App. 6a.

[17] Moore Cert. Pet. App. 29a.

attributed to it by Moore, *i.e.* that Moore's admonition to Taylor that he "leave [her] alone" was a complaint to him about sexual harassment that is not protected by Section 704(a), the other circuits cited by Moore have not addressed whether the rejection of a non-supervisor's allegedly harassing advances constitutes protected opposition under Section 704(a). Moore incorrectly relies on *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000), as evidence of an applicable circuit split, because the harasser who received the plaintiff's complaint/rejection in that case was her district manager who was responsible for determining her raises and completing her performance evaluations. 214 F.3d at 1003. Moore next relies upon *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999), notwithstanding the fact that there was no claim of protected opposition under Section 704(a) in that case, and the plaintiff had repeatedly reported the unwelcome harassment by her ex-husband to the company's management. 165 F.3d at 638. Similarly, there was no claim of protected opposition under Section 704(a) in *DeGrace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1980), the next case on which Moore relies. Finally, in *Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179 (7th Cir. 1982), the last case relied upon by Moore as direct support for the alleged split of authority, the plaintiff wrote a memorandum *to her direct supervisor* about his harassment of a third party, and the retaliation claim was not exclusively based on that complaint. 669 F.2d at 1180. Therefore, this case does not present a split of circuit authority on a ruling issued by the Eleventh Circuit in the case below.

Moreover, this case does not present the untenable "express judicial sanction for employers who want to punish the harassment victim herself"[18] alleged by Moore, nor does it present "a cruel dilemma when *a supervisor* demands sexual favors on pain of dismissal"[19] as she contends. First, the conduct of Taylor following the communication ban was neither a demand for sexual favors nor a demand from a supervisor.

Second, Moore is simply incorrect in stating that "[u]nder the decision below, [an employee fired for rejecting her harasser's advances] would only have a claim for the harassment suffered on the job, and could not sue for the dismissal that ultimately resulted."[20] This Court need look no further than *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999), a case cited by Moore, for an example of an employee's recovering an award of back pay for termination of her employment following her actions to defend against discriminatory harassment where the termination was the result of such discriminatory harassment. It is axiomatic that an employee can recover damages from the termination of her employment where such termination is an adverse employment action arising out of prohibited harassment under Title VII.

Finally, Moore implies that there were only two choices available to her under the rule of law espoused by the Eleventh Circuit in this case: reject the "supervisor['s]" demand and be fired as a result without the ability to

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[18] Moore Cert. Pet., p. 20.

[19] Moore Cert. Pet., p. 25 (emphasis added).

[20] Moore Cert. Pet., p. 24.

recover damages for the termination of employment under Section 704(a), or submit to the demand and then complain to management or the EEOC and suffer a claim that her submission demonstrated that the activity was consensual.[21] She failed to address the third option, which is entirely consistent with this Court's jurisprudence on harassment complaints: reject the non-supervisor harasser's proposal, and report the incident to company management pursuant to stated complaint procedures. In the instant case, TPA told Moore to report any complaints about Taylor or any other employee to Pruitt or Smith, both members of TPA management, but instructed Moore not to communicate directly with Taylor. By complaining that she could not ignore TPA's instructions, complain directly to her non-supervisor harasser, and still enjoy the possibility of recovering damages for a harassment claim and a separate retaliation claim, Moore attempts to convert a statement of rejection to a non-supervisor harasser into a protected complaint. Title VII does not allow a plaintiff to bypass the complaint to management requirement of the opposition clause under Section 704(a) in this manner. Moore has cited no cases that establish a split of authority on that issue.

C. The Ruling Below On Moore's Complaint To Taylor Does Not Conflict With Existing Supreme Court Precedents.

Moore does not argue that the Eleventh Circuit's ruling below directly conflicts with this Court's precedents.

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[21] Moore Cert. Pet., pp. 25-26.

Instead, Moore recognizes that *Faragher* holds that an employer will be liable for sexual harassment if it culminates in a tangible employment action against the victim of harassment, yet complains that she could not recover damages for the termination of her employment arising out of such harassment in violation of the principles espoused in this Court's *Faragher* decision. For the reasons stated above, it is entirely consistent with this Court's jurisprudence to allow a plaintiff to recover back pay, compensatory, and even punitive damages for a discriminatory termination of employment arising out of unlawful harassment, while at the same time denying protected status to a statement rejecting a non-supervisor's non-sexual communication under the opposition clause on a retaliation claim.

IV. The Decision Of The Eleventh Circuit May Be Upheld Because It Is Also Correct Under Other Standards.

In reviewing the decisions below, this Court is not limited to the grounds embraced by the lower courts. *See U.S. v. Arthur Young and Co.*, 465 U.S. 805, 814, n.12 (1984) (a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below); *U.S. v. New York Tel. Co.*, 434 U.S. 159, 166, n.8 (1977); *Dandridge v. Williams*, 397 U.S. 471, 475-76, n.6 (1970). Rather, the decisions below may be upheld on grounds not alleged by any respondent or considered by the courts below. *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1517 (11th Cir. 1994); *Powers v. U.S.*, 996 F.2d 1121, 1123-24 (11th Cir. 1993).

Even if the Eleventh Circuit had made its own judgment as to the merits of Moore's claim of an objectively hostile environment, and even if the Eleventh Circuit had ruled that Moore's statement to her alleged harasser was a complaint about sexual harassment that was not protected opposition under Section 704a, the decisions below contain ample justification to decline review of the Eleventh Circuit's decision on other grounds. Some of the reasons to decline review of the Eleventh Circuit's affirmance of summary judgment in favor of TPA despite the purported rulings challenged by Moore include: (1) no reasonable juror could find that Taylor's conduct created an objectively hostile work environment giving rise to Title VII liability; (2) no reasonable juror could find that Taylor's conduct, even if objectively hostile, interfered with Moore's job performance; and (3) Moore cannot establish pretext to overcome TPA's legitimate, nondiscriminatory reason for terminating her employment on the basis of her violation of the communication ban.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny Moore's Petition for Writ of Certiorari.

Respectfully submitted,

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